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Dear Administrative Counsel:

We are submitting these comments on behalf of the Michigan State Planning Body for the Delivery of Legal Services to the Poor (“Planning Body”)¹.

The Planning Body works closely with the State Bar of Michigan—since the State Bar has long had a goal of supporting “the effective delivery of high quality legal services and programs to benefit underserved populations,” (Report at p. 4). The Planning Body is not a Bar entity. Members to the Planning Body are selected by the Planning Body, not appointed by outside entities; there are only two current Planning Body members who were invited because of their affiliation with the State Bar.

The Planning Body recognizes the challenges faced by the Supreme Court Task Force. We are grateful to the Task Force members for their service and we appreciate their efforts. We believe that the Report identifies important issues that should be addressed and provides a structure—considering policy positions; regulatory services; and governance—for considering the balance between the public’s interest in lawyer regulation and in access to justice versus the first amendment rights of individual lawyers.

¹ The Planning Body is an unincorporated association of 38 individuals—from legal services organizations, the private bar, the judiciary, and from non-legal advocacy and service organizations. The purpose of the Planning Body is to plan, organize, and coordinate an effective legal services delivery system in the state of Michigan.

The Planning Body has existed in some form since 1995. At that time, legal aid programs were directed by their federal funder, the Legal Services Corporation (“LSC”), to convene state-based planning entities to develop a comprehensive and integrated state level delivery system for legal services to the poor. The federal requirement to maintain such a body expired in 2005. However, the Michigan programs saw the value of broad stakeholder input into the legal aid delivery system and have voluntarily continued the Planning Body.

Although Planning Body members participate in a broad range of SBM programs and activities, the Planning Body's organizational work is most closely aligned with the Bar's Justice Initiatives work. For that reason, we will focus our comments on Recommendation 2 of the Report.

Overall Support for the Recommendations of the Report. The Planning Body wholly supports Recommendation 1 in the Report—i.e., to continue the State Bar as a mandatory bar. We agree that many parties—individual lawyers; the legal profession; the courts; the legislature; the public—benefit from a well governed and well regulated legal profession that is able to educate and advocate on behalf of the justice system.

We recognize two broad public interest values in maintaining a mandatory Bar—first, the public benefits from the regulatory protections provided by the Bar and the Court; second, the public benefits from the expertise of practicing lawyers in assuring access to and improvements in the justice system.

For this reason, we are in general agreement with Recommendation 3 (calling for better integration of the Bar with other lawyer regulatory agencies); Recommendation 4 (regarding State Bar governance); and Recommendation 5 (regarding reduced dues for inactive members).

Governmental Relations and Justice Initiatives. Our analysis of the Governmental Relations section of the report (Recommendation 2) begins with two observations: (a) Both the State Bar and the Court have a role in and a commitment to supporting access to justice. See, e.g., MRPC 6.1. (b) This Court has recognized that the Bar has an appropriate role in engaging in activities designed to make legal services accessible to the poor, see **Falk I**, 411 Mich 63, at p. 116 (1981); **Falk II**, 418 Mich 270, at p. 304 (1983).

We believe that the Bar's commitment to access to justice should be supported and celebrated. Indeed, the report cites two examples of "the State Bar's role as a conduit for innovation and consensus" (Report at p. 11)—both included significant involvement from members of the Bar's Committee on Justice Initiatives.

The Planning Body agrees with the basic premise of Recommendation 2 of the Report—i.e., that the Bar should be subject to a more rigorous, focused, intentional Keller review. Our concerns with this section of the report are that it appears to create a series of overlapping, duplicative, inefficient, and confusing Keller review processes—these include:

- a. New and stricter rules (procedural and substantive) for determining when the Bar may take a public policy position;
- b. New and stricter rules as a pre-requisite to commenting on legislation;
- c. The creation of a new Keller review panel;
- d. Defined appointments to that panel including members outside the Bar governance structure;
- e. The requirement that the review panel will base its decisions on the written recommendations of legal counsel who is subject to Supreme Court approval;
- f. The requirement of a supermajority (5 of 7 votes) by the review panel on every Keller issue;

- g. A series of advocacy restrictions that would prohibit Bar comments on some issues, even if those issues are otherwise Keller permissible²;
- h. For Justice Initiatives programs only there should be “heightened Keller scrutiny and review” (Report, at p. 14);
- i. The Justice Initiatives budget could only be funded if approved by a 75% supermajority.

We are concerned that the report’s recommendations are out of scale with the scope of the problem. We would urge the Court to focus on improving the Keller review process—both substantively and procedurally—through a simpler and more transparent process.

We believe that our collective goal—a more rigorous and focused Keller review—can be achieved more effectively by implementing a few of the Task Force’s most central recommendations:

- (a) Every legislative or policy position that comes to the Board of Commissioners should be subject to a Keller review by designated legal counsel who is hired by the Bar subject to the approval of the Court (See Report, pp. 6-7).
- (b) These opinions and the Board’s actions should be published on the SBM website; the dissent of any member should also be published on the Bar website (see Report at p. 8, Section 3(b) and (d)).
- (c) The following activities should be recognized as Keller-permissible: positions on legislation, policies, or initiatives that regulate or directly affect the regulation of the legal profession; positions on legislation, policies, or initiatives that improve or diminish the quality of legal services, such as by providing or impeding legal services for the poor or disadvantaged, or by affecting the delivery of legal services by lawyers, other legal services providers, or the courts (See Report, p. 8, Section 4(a)(i) and (ii))³.

We are concerned that the list of “Keller permissible yet still prohibited” activities (see Report, at p. 9, Section 4(b)) is too vague and will create confusion⁴. We do not believe that a list of additional prohibited items is necessary; we believe that the interests of the public and of lawyers are best served by a single clear Keller standard that is applied consistently to all Bar activities.

² Ballot issues; election law; judicial selection; issues perceived to be associated with on party or candidate; endorsement of candidates; matters that are primarily intended to personally benefit lawyers, law firms, or judges; issues that are perceived to be divisive within the bar membership. See Report at p. 9.

³ We are concerned with the apparent conflict between Sections 4(a)(i) and (ii) of the Report and Section 4(a)(iii)). It is not clear to us whether this latter provision is intended to expand permissible advocacy beyond what is defined in Section 4(a)(i) and (ii) or whether this provision is meant to be a further limit on otherwise-permissible advocacy. We support this provision as an expansion but oppose it if it is intended as a further limitation. If the latter, it would create the possibility that the Bar’s voice on a legislative proposal—on an issue that is critical to the protection of the public, is fully Keller-permissible, and is unanimously supported by the Bar membership—could be silenced at the whim of a single non-attorney individual.

⁴ As examples, as to 4(b)(iii), the State Bar has for many years supported a Judicial Qualifications committee. Is the prohibition on participation in “judicial selection” meant to eliminate this committee? Or does this provision have some narrower meaning, e.g., prohibiting the Bar from advocating for or against specific candidates in the public election process? As a second example, the use of the word “perceived” in 4(b)(iv) and (vi) create an entirely subjective standard.

We specifically disagree with both parts of the recommendation regarding Justice Initiatives—the recommendation for “heightened scrutiny” and the requirement of a 75% supermajority for the Justice Initiatives budget, see Report at p. 14.

We are concerned that this section of the Report, if adopted by the Court, may be seen as the Court rejecting or limiting its past support for these efforts.

The Report doesn’t explain how this “heightened scrutiny” will be effected—to Planning Body members who have participated in the Bar budget process, this recommendation seems impractical. The budget will list expenses by line—e.g., salaries; fringe benefits; phone costs; travel costs; etc. There is no discussion in the budget process of specific advocacy initiatives. Also, consideration of the Bar’s annual budget implicates concerns about the overall financial management of the Bar—concerns that are wholly unrelated to the substantive advocacy review required by Keller. Most of the work of the Justice Initiatives (e.g., encouraging pro bono) have nothing to do with policy positions or governmental relations—yet all of these programs will be eliminated if the Justice Initiatives budget fails to obtain a 75% supermajority.

We believe that the other sections of the Report noted above provide a roadmap towards a more rigorous, transparent, and understandable set of Keller standards. We believe that the Bar and the public are best served by a single set of standards that apply to the entire Bar. We believe that creating a double standard that is applicable only to the Bar’s access to justice work will undermine efforts that are supported by this Court and include critical protections to the public.

Conclusion. For the reasons set forth above, we urge the Court to modify the recommendations of the Task Force relating to Governmental Relations and Justice Initiatives. We encourage the Court to adopt a simpler Keller review process that adopts the core recommendations of Task Force but uses the suggestions in these comments to avoid the complexity and inconsistencies in the Task Force Report.

Please feel free to contact either of us if you have any questions or would like any additional information.

Respectfully submitted,

/s/ Denise Page Hood
Hon. Denise Page Hood
Co-Chair

/s/ Robert F. Gillett
Robert F. Gillett
Co-Chair